# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>March 18, 2003 |
| v | No. 237579<br>Wayne Circuit Court |
| SAMMY EDMONDS,<br><br>Defendant-Appellee. | LC No. 01-004224-01 |

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion to suppress evidence and dismissing the charge of carrying a concealed weapon, MCL 750.227. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

## I. Facts and Procedural History

As noted, defendant was charged with carrying a concealed weapon in violation of MCL 750.227. Prior to trial, defendant challenged the seizure of the evidence – two nine-millimeter guns found in the trunk of the car – on the basis that there was no probable cause for his arrest, and the seizure of the evidence was therefore improper. An evidentiary hearing was held on defendant's motion. At the hearing, Michigan State Police (MSP) Trooper Robert Prause[1] testified that he was on patrol in Detroit on March 6, 2001, when he observed a speeding vehicle. Trooper Prause testified that he estimated the vehicle to be traveling approximately 60 mph in a 35 mph zone. Trooper Prause turned the squad car around and followed the vehicle, paced it at 37 mph in a 30 mph zone, and pulled it over. Defendant was driving the car. Upon the trooper's request for identification, registration, and proof of insurance, defendant produced an Ohio driver's license and rental car agreement. Defendant, whose name was not listed on the agreement, first said that his wife (actually fiancé) rented the car, but her name was not on the agreement.[2] According to Trooper Prause, defendant then told him that his fiancé's friend rented

[1] Only two witnesses testified at the less than two-hour hearing – Trooper Prause and defendant. Trooper Prause's partner, MSP Trooper Hall, was unavailable to testify, but had testified at a previous preliminary exam. No exhibits were admitted into evidence, although the preliminary exam transcript was in the lower court file.

[2] According to Trooper Prause, the name on the rental agreement was Dile Mohamed. At the (continued…)

the car because defendant did not have a credit card. Defendant also testified that he was given permission to drive it to Michigan.

According to the unrefuted testimony of Trooper Prause, standard MSP procedure in this situation (i.e., when there is an unauthorized person driving a rental vehicle) is to contact the rental car company in order to verify the authorized drivers and to determine if the agency wanted the car impounded which, according to Trooper Prause, "they do almost a hundred percent of the time." Pursuant to this policy, calls were immediately placed to the rental car agency (Alamo). Defendant also gave contradictory information to the trooper about where he was coming from, and why he was in Detroit.

Trooper Prause testified that defendant gave him consent to both conduct a pat down search and to search the vehicle. Trooper Prause testified that defendant became restless as Prause approached the trunk, and did not obey the other officer's command to stay put. According to Trooper Prause, defendant consented to being handcuffed to the bumper of the patrol car.[3] Two nine-millimeter handguns were found in the trunk of the car. One of them was loose and loaded and the other was in a case.[4] Almost immediately after defendant was arrested, the rental car agent returned the officer's call and told them that he wanted the car impounded and that a representative would come out to pick it up. It is the MSP standard operating procedure that prior to an impound, a car be secured and its contents completely inventoried.

After the testimony was concluded, the parties argued their respective positions. Defendant argued that he had not consented to the trunk search, that there was no probable cause to suspect criminal activity, and thus, the search was unlawful. Defendant also argued that finding the weapons through an inventory search was "fruit from the poisonous tree" because the initial arrest and search was unlawful. Before the prosecution made its closing argument, the court questioned defendant's counsel to see if he was challenging the initial stop, to which he responded in the negative. Thus, the court and defense counsel were "on the same page" because defense counsel had "no problems with the stop."

The prosecutor argued that given the validity of the stop, the court only had to determine that Trooper Prause gave credible testimony that defendant consented to the search. If the court did not accept his testimony, the prosecutor argued, then the court could still find the evidence of the guns admissible because they would have been inevitably discovered through an inventory search.

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(…continued)

hearing, defendant testified that the car was actually rented by his fiancé's brother.

[3] Defendant testified that he did not give police permission to search the vehicle, nor did he give them permission to handcuff him to the patrol car.

[4] The unloaded and encased weapon belonged to passenger Don Brown, who had also been arrested. The charge against Mr. Brown was dismissed in the district court and no appeal was taken from that ruling.

After arguments, the court issued its ruling from the bench.[5] The court concluded, citing *Knowles v Iowa*, 525 US 113; 119 S Ct 484; 142 L Ed 2d 492 (1998), that the officers had no reasonable and articulate suspicion of criminal activity to support a warrantless search of the vehicle. Additionally, the court found that defendant had not consented to the search. The court therefore found the search unlawful, suppressed the evidence, and dismissed the charges. Despite the prosecution's request, the court refused to rule on the inevitable discovery argument.

## II. Analysis

When considering a motion to suppress evidence, this Court reviews a trial court's factual findings to determine if they are clearly erroneous and reviews a trial court's conclusions of law de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

Police may search a motor vehicle without the necessity of obtaining a warrant if probable cause to support the search exists. *People v Kazmierczak*, 461 Mich 411, 419; 605 NW2d 667 (2000). Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the place to be searched. *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992).[6]

We only briefly address plaintiff's argument that the troopers had probable cause to search the vehicles because we conclude that the trial court's factual findings were not clearly erroneous, and that it properly applied the law to those facts. At the evidentiary hearing Trooper Prause admitted that he had no reasonable suspicion that defendant was engaging in contraband, and he did not suspect defendant was dealing in drugs. Even giving some deference to Trooper Prause's ten years of experience and to his assertion that he felt "something was afoot," the record supports the trial court's factual determination that the troopers provided no articulable and reasonable suspicion of criminal activity, and thus, lacked probable cause to conduct the search.[7]

This leads us to plaintiff's second argument, that the weapons would have been discovered despite the lack of probable cause to search because the car was eventually impounded and subject to an inventory search. Although the trial court declined to address the issue, we will decide it because it was properly before the lower court and it presents a question of law for which all necessary facts have been presented in the record. *People v Yopp*, 25 Mich App 69, 72 n 4; 180 NW2d 897 (1970). Because the trial court did not rule on this issue below,

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[5] At the commencement of the hearing, the prosecutor raised the issue of defendant's standing on the basis that he had no protected privacy interest in the rental car. The court indicated that defendant did have standing because he was the driver of the vehicle.

[6] Plaintiff does not argue on appeal that defendant gave his consent to the officers to search the trunk. Further, although plaintiff does not argue the standing issue to this Court, we note that some courts have held that an unauthorized driver of a rental car has no standing to challenge a search of the vehicle. Compare *United States v Jones*, 44 F3d 860, 871 (CA 10, 1995) with *United States v Gama-Bastidas*, 142 F3d 1233, 1239 (CA 10, 1998).

[7] We note that Trooper Prause even admitted that it was "borderline" whether he had reasonable suspicion of criminal activity.

we apply a de novo standard of review. *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984).

Both article 1, § 11 of the Michigan Constitution of 1963 and the Fourth Amendment to the United States Constitution protect citizens from unreasonable searches and seizures. At the turn of the last century, several United States Supreme Court decisions determined that evidence obtained in violation of the Fourth Amendment's proscription must be excluded from evidence. *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999).[8] The "exclusionary rule," as it is now called, also "prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so called 'fruit of the poisonous tree' doctrine." *Id.* at 633-634, citing *Wang Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

In *People v LoCicero* (*After Remand*), 453 Mich 496, 508-509; 556 NW2d 498 (1996), our Supreme Court succinctly stated the exclusionary rule and the recognized exceptions to the rule:

> The exclusionary rule forbids the use of direct and indirect evidence acquired from governmental misconduct, such as evidence from an illegal police search.
>
> Three exceptions to the exclusionary rule have emerged: the independent source exception, the attenuation exception, and the inevitable discovery exception. [(Citations omitted.)]

The inevitable discovery exception is at issue in this case. Turning once again to *Stevens*, the Court set forth both the exception and the concerns behind invocation of the inevitable discovery exception:

> The inevitable discovery exception generally permits admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means. . . then the deterrence rational has so little basis that the evidence should be received." *Id.* at 444, 104 S Ct 2501. If the evidence would have been inevitably obtained, then there is no rational basis for excluding the evidence from the jury. In fact, suppression of the evidence would undermine the adversary system by putting the prosecution in a worse position than it would have been in had there been no police misconduct. *Id.* at 447, 104 S Ct 2501.
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> The United States Court of Appeals for the First Circuit set forth the following factors in applying the inevitable discovery doctrine:

[8] According to the *Stevens* Court, those three cases are *Weeks v United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914), *Adams v New York*, 192 US 585; 24 S Ct 372; 48 L Ed 575 (1904), and *Boyd v United States*, 116 US 616; 6 S Ct 524; 29 L Ed 746 (1886). *Id.* at 634.

> [T]here are three basic concerns which surface in an inevitable discovery analysis: are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection? [*Stevens, supra* at 636.]

With respect to the particular circumstances of this case, courts have held that evidence is not subject to exclusion despite an unlawful seizure if it would have been inevitably discovered through an inventory search conducted on a lawfully impounded vehicle. See, e.g., *People v Toohey*, 438 Mich 265; 271; 475 NW2d 16 (1991); *People v Spencer*, 154 Mich App 6, 17-18; 397 NW2d 525 (1986); *United States v Haro-Salcedo*, 107 F3d 769, 771-772 (CA 10, 1997); *United States v Kimes*, 246 F3d 800, 804-804 (CA 6, 2001).

In the instant case, Trooper Prause provided unrefuted testimony that the standard operating procedures for the MSP is that when a rental vehicle is pulled over and an unauthorized person is driving, the rental agency must be called. The rental agency is then asked whether the person driving or a passenger is authorized to drive the vehicle and, if not, if the agency wants the vehicle impounded. According to Trooper Prause, the rental agency requests impoundment almost every time. Once impoundment is requested, MSP procedures require that an inventory of all personal items in the vehicle be conducted.

According to the undisputed evidence, the Troopers continuously attempted to contact the rental agency once it was determined that defendant was an unauthorized driver. At approximately the same time defendant was arrested, the rental agency finally contacted the troopers and requested that the vehicle be held (i.e., impounded) and that it would be sending a representative out to pick up the vehicle. Hence, the undisputed evidence before the trial court showed that the MSP had a procedure for conducting inventories of impounded vehicles, and that it was followed in this particular instance. As such, even if the unlawful search was not conducted, the police would have still discovered the evidence while conducting the inventory search. The evidence therefore was excepted from the exclusionary rule, and should have been admitted. *Stevens, supra.*[9]

On appeal defendant argues that the inevitable discovery exception does not apply because the police were not authorized to remove the vehicle under MCL 257.252d. Defendant's argument is, for several reasons, misplaced. First, MCL 257.252d is a statutory scheme indicating under what circumstances a registered owner of a vehicle impounded and towed for

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[9] In fact, on cross-examination Trooper Prause testified that even if defendant had not consented to a search of the vehicle, he still would have located the weapons through the inventory search:

> Q. (By defendant's counsel) Yes, sir. And had he told you he did not want you to search the vehicle, what would have happened?
>
> A. I would have searched it anyway because I would have had the inventory. I would have just waited a little bit longer for the Alamo rental car to get a hold of us to impound vehicle and do an inventory search.

certain reasons is required to pay the removal and safekeeping costs. See MCL 257.252d(1); *Auto Club Ins Ass'n v Farmington Hills*, 220 Mich App 92, 94-99; 559 NW2d 314 (1996). The statutory scheme therefore has no application to the instant case, as this case does not involve a contest by the registered owner (Alamo) over costs connected with the removal and safekeeping of the vehicle.

Second, case law makes clear that the police's ability to make impoundment decisions and inventory searches can arise from either statutory law authorizing such actions *or* "when it is part of 'routine administrative care taking functions' of the police." *Woodford v State*, 752 NE2d 1278, 1281 (Ind, 2001), quoting *South Dakota v Opperman*, 428 US 364, 370 n 4; 96 S Ct 3092; 49 L Ed 2d 1000 (1976). Here, it is unquestionable that impounding a vehicle owned by a third-party, and driven by an unauthorized individual, is part of the police's role of protecting the public. Indeed, courts have routinely held that police act reasonably under the Fourth Amendment by impounding a vehicle where either the owner is unknown or where the driver is not authorized to drive the vehicle.[10] See, e.g., *United States v Long*, 705 F2d 1259, 1262 (CA 10, 1983) ("Because none of the four could establish ownership of the Thunderbird, the police could properly impound the car until ownership could be ascertained."); *Woodford, supra* at 1281-1282; *People v Grear*, 232 AD2d 578; 649 NYS2d 36 (1996) ("Since neither the driver nor the passenger was listed on the rental agreement, it was reasonable for the arresting officer to make further inquiry into the status of the rental car."). As the Tenth Circuit held in *United States v Shareef*, 100 F3d 1491, 1508 (CA 10, 1996):

> After the felony stop procedures were complete, the officers diligently pursued their investigation into the authority of the defendants to operate the vehicles. It was inevitable that the officers would request the rental agreements and discover that the defendants were not authorized to drive the vehicles. At no point did any defendant produce a valid license, registration or proof of legal entitlement to the vehicles. We have held that law enforcement officers may impound an automobile until the ownership of the vehicle can be ascertained.

In the instant case, the police were confronted with a vehicle owned by a third-party (Alamo) and being driven by a person who neither rented the vehicle nor who was otherwise authorized to drive it. Additionally, none of the passengers were listed as authorized drivers. Hence, under the foregoing case law, the officers acted reasonably in impounding the vehicle because none of the occupants appeared to be authorized to drive the vehicle.[11]

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[10] Although these cases involve impoundments after an arrest, the rationale of upholding the impoundment and subsequent inventory search is the lack of a lawful driver available to take the vehicles, not the simple fact of an arrest. Hence, these cases are useful guidance despite the fact we are assuming defendant would not have been under arrest at the time of the impoundment in the absence of an unlawful search.

[11] Indeed, given that defendant allegedly had been authorized to drive the vehicle from his fiancé's brother but not from Alamo, it would have been reasonable for Trooper Prause to believe that defendant had violated MCL 750.414. *United States v One 1941 Chrysler Brougham Sedan*, 74 F Supp 970, 973 (ED Mich, 1947), aff'd 171 F2d 549 (CA 6, 1948).

In sum, because the weapons would have been inevitably discovered as a result of the inventory conducted prior to turning the vehicle over to Alamo, an inventory done pursuant to standard MSP procedures, they were properly seized, despite the unlawful search. Regardless of whether defendant was lawfully arrested, or consented to the search, the evidence would have been lawfully discovered by the police pursuant to a proper impoundment and inventory of the vehicle.[12] We therefore reverse the trial court's order suppressing the evidence and remand this case for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray

[12] For this reason, *Knowles*, *supra*, is distinguishable. In *Knowles* there was no reason to hold the defendant after issuing the ticket. To the contrary, in this case the police had very good reasons to hold the vehicle (as opposed to defendant): no authorized driver was available to drive the car and a MSP procedure required contacting the rental agency. These significant distinctions take this case out of the realm of *Knowles.* See *United States v Landfair*, 207 F3d 521, 523 (CA 8, 2000) (distinguishing *Knowles* on the basis that the defendant was searched based on probable cause, not the issuance of a traffic ticket).